

STATE OF MICHIGAN
COURT OF APPEALS

ECOTONE DEVELOPMENT, L.L.C., KURT
CIESZKOWSKI and DAVID KALEEL,

UNPUBLISHED
June 18, 2013

Plaintiffs/Counter-Defendants-
Appellants,

v

No. 306528
Wayne Circuit Court
LC No. 10-012763-CK

COMERICA BANK and CATHERINE
CORNELL,

Defendants/Counter-Plaintiffs-
Appellees.

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs, Ecotone Development, LLC, Kurt Cieszkowski, and David Kaleel (collectively, Ecotone), appeal as of right the trial court's orders granting summary disposition in favor of defendants, Comerica Bank and Catherine Cornell (collectively, Comerica), on the complaint and counter-complaint in this case. Ecotone contends that the trial court should have granted its motion for relief from judgment because Comerica did not properly serve the motions. We affirm.

I. FACTS

Ecotone and Comerica entered agreements that created an open-ended construction loan concerning a commercial property in Cleveland, Ohio. In November 2010, Ecotone sued Comerica, asserting that it breached the parties' contract by failing to convert the construction loan into a fixed loan. Comerica responded that it did not convert the loan because Ecotone did not comply with the terms and conditions of the parties' agreement. Comerica also filed a counterclaim, asserting that Ecotone defaulted on the promissory note. In Ecotone's answer to Comerica's counterclaim, Ecotone's attorney, Douglas McKinney, listed his zip code 49321; the correct zip code was 48321.

In March 2011, Comerica moved the trial court for summary disposition under MCR 2.116(C)(7), (8), and (10). Comerica attached the affidavit of its employee, Christopher Hoffman, in which he asserted that Ecotone's account balance was \$701,755. Comerica served a copy of the motion by first class mail to McKinney's PO Box in "Auburn Hills, Michigan, 49321-4145."

Comerica also moved the trial court to direct Ecotone's tenant to pay its rent directly to Comerica. On April 1, 2011, the trial court heard arguments on Comerica's motion to direct rent. McKinney was not present at the hearing, and the trial court granted Comerica's motion.

On April 20, 2011, Ecotone moved the trial court for relief from judgment and for leave to file a late response to Comerica's motions for summary disposition. McKinney asserted that (1) on January 5, 2011, he moved to an address in Troy, Michigan, and (2) he had not received copies of Comerica's motions. Comerica served a second copy of its motions for summary disposition to both of McKinney's addresses on April 26, 2011.

On May 13, 2011, Comerica responded to Ecotone's motions by asserting that it had served the motions to McKinney's last known address. Comerica attached a print-out of the Michigan Bar's web site, which listed McKinney's address as his Auburn Hills P.O. Box. Comerica also attached an e-mail from McKinney, dated May 5, 2011, in which McKinney stated that he "still receive[d] mail at P. O. Box 214145, Auburn Hills, Michigan, 48321-4145."

Ecotone did not respond to Comerica's motions for summary disposition. On May 17, 2011, the trial court granted the motions on the basis that Ecotone had failed to file a response to them. On May 20, 2011, the trial court heard arguments on Ecotone's motions for relief from the April 1, 2010 order, and for leave to file a late response to Comerica's motion for summary disposition. Ecotone has not provided a transcript of this hearing to this Court. On June 3, 2011, the trial court entered its written order denying Ecotone's motions. The trial court's order allowed Ecotone to present proofs concerning the amount of damages that it owed Comerica.

On June 8, 2011, Ecotone moved the trial court to reconsider its order granting Comerica's motions. The trial court denied Ecotone's motion for reconsideration. The trial court gave Ecotone 30 days to take depositions or come forward with evidence to dispute Comerica's asserted amount.

Ecotone failed to submit any evidence concerning damages. On June 14, 2011, Comerica moved the trial court to enter a judgment for \$698,986, representing the amount that Ecotone owed Comerica over and above setoffs. Ecotone asserted that the trial court should hold an evidentiary hearing to determine the amount owed. After the evidentiary hearing, at which Comerica responded that Ecotone had failed to provide any documentary evidence to dispute the amount, the trial court entered judgment in favor of Comerica for \$725,347.

II. RELIEF FROM JUDGMENT

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision on a motion for relief from judgment.¹ The trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes.²

¹ *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007).

B. LEGAL STANDARDS AND APPLICATION

Ecotone asserts that the trial court improperly denied its motion for relief from judgment. Despite requests from this Court, Ecotone has not provided this Court with a transcript of the May 20, 2011 hearing. A party waives this Court's review of the trial court's decision when the party fails to provide this Court with a record of the decision.³ We conclude that Ecotone waived our review of this issue by failing to provide this Court with the record of the hearing at which the trial court denied Ecotone's motion for relief from judgment.

III. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.⁴ When a party moved the trial court for summary disposition under MCR 2.116(C)(8) and (10) and the trial court considered documents outside of the pleadings when deciding the motion, we review the trial court's decision under MCR 2.116(C)(10).⁵

A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."⁶

B. LEGAL STANDARDS

To survive a motion for summary disposition, once the nonmoving party has identified issues for which there are no disputed material facts, the burden is on the plaintiff to show that disputed facts exist.⁷ The nonmoving party "must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists."⁸ If the nonmoving party does not make such a showing, the trial court properly grants summary disposition.⁹

C. APPLYING THE STANDARDS

Ecotone contends that the trial court's failure to consider Ecotone's response to Comerica's motion was error. We reiterate that Ecotone has failed to provide this Court with a transcript of the May 20, 2011 hearing at which the trial court denied Ecotone's request to file a

² *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

³ MCR 7.210(B); *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005); *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

⁴ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁵ *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

⁶ MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

⁷ MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

⁸ *Quinto*, 451 Mich at 362.

⁹ *Id.* at 363.

late response to Comerica's motion for summary disposition. Ecotone has waived this Court's review of that decision.¹⁰

Further, the trial court properly grants a party's motion for summary disposition when the opposing party fails to respond.

When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. *If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.*^[11]

Here, Comerica established with documentary evidence that counsel continued to receive and respond to service of process at his Auburn Hills address, despite the error in the zip code. Comerica further established that Ecotone owed Comerica \$698,986 on an open-ended mortgage account. Ecotone failed to timely contest Comerica's motion for summary disposition, and did not provide any documentary evidence to rebut Comerica's evidence. When the trial court afforded Ecotone a period of time to contest Comerica's assertion concerning the amount of damages, it failed to do so. Therefore, Ecotone did not establish that there was any issue of material fact regarding its liability or the amount of damages that it owed, and the trial court properly granted summary disposition.

We affirm.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

¹⁰ See MCR 7.210(B); also see *Reed*, 265 Mich App at 160; *Elston*, 462 Mich at 762.

¹¹ MCR 2.116(G)(4) (emphasis supplied).